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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. .....

FRANK EDWARD WILLIAMS, SR., PETITIONER,

versus

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Frank Edward Williams, Sr., prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case on May 7, 1973.

CITATION TO OPINION BELOW

The *per curiam* opinion of the United States Court of Appeals from the Fourth Circuit is unreported. A copy of same is set forth as an appendix to this petition.

JURISDICTION

The jurisdiction of the United States Court of Appeals for the Fourth Circuit was entered May 7, 1973. On June 1, 1973, by order of the Chief Justice Burger, the time within which to file the petition for writ of *certiorari* was extended to and including June 21, 1973. The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

Whether the Court of Appeals for the Fourth Circuit correctly disposed of the issues presented on appeal from the United States District Court for the District of South Carolina to the effect that:

I. A Judgment of Acquittal should have been ordered as to the second count of the indictment in that there was no competent evidence to identify the automobile described in said second count of said indictment and the Government thereby failed to prove an essential element of the charge against the defendant, to wit: That the automobile was a stolen automobile.

II. Appellant was denied the protection of the Sixth Amendment to the Constitution of the United States in that the jury was allowed by the Trial Judge to hear damaging hearsay testimony concerning the identity of the automobile set forth in Count No. 2 of the indictment, which error was not cured by subsequent instructions by the Trial Judge that said testimony be disregarded.

III. The supplemental "Allen Type" instructions were prejudicial to the petitioner in that (1) specifically, the instructions given in this case contained irrelevant and immaterial matter which coerced the jury; (2) such type of instructions are completely unnecessary and serve no useful purpose, and should be abolished by this Court.

STATEMENT

Petitioner, Frank Edward Williams, Sr., was convicted of having received a stolen motor vehicle which had moved in interstate commerce in violation of Title 18, United States Code, Section 2312.* The relevant facts which led to petitioner's arrest and conviction are as follows:

Petitioner, a funeral director, purchased several automobiles during the period December, 1969 to February, 1970, including the automobile involved in this petition. That automobile, a 1970 Chevrolet Impala, was alleged to have the Serial Number VIN164390T-139578 and was alleged to be the property of Mrs. Lillian Winnegrad of New York (R., 1a).

During the trial, Mrs. Winnegrad testified that she was the former owner of an automobile, a Chevrolet Impala having the Serial Number 164370T139578 (R., pp. 13, 15), which is different from the number alleged in the indictment. She further testified that she had not seen her automobile since it disappeared from in front of her home and had not seen the automobile found in petitioner's possession (R., 17). Both Mrs. Winnegrad and her husband stated that they had no way of knowing whether the automobile found in petitioner's possession was theirs (R., 61).

Subsequent to Mrs. Winnegrad leaving the witness stand, the court questioned the validity of testimony of Richard D. Oyler, special agent for F.B.I., as to the automobile and also as to photographs attempted to be introduced as to the automobile found in the possession of the petitioner because of this variation in serial number and by virtue of the fact that different numbers created a question as to whether or not such testimony was relevant or

* The indictment contained three counts, alleging three separate offenses. Petitioner was found guilty under the second count thereof.

material in that it appeared to be a different automobile (R., pp. 51, 58).

Mrs. Winnegrad was recalled to the stand and in effect testified that the serial number information first testified to was obtained from her insurance policy. Also she further testified as to an invoice or sales memorandum which she had in her possession which invoice contained only the following digits: 164390; but did not contain the full serial number (R., pp. 58, 61).

No photographs were shown to Mr. or Mrs. Winnegrad, nor did they identify any automobile from photographs (R., pp. 12, 17 and 58, 62).

During the course of the trial, counsel for petitioner objected to the admission of testimony of the witnesses, Plowden, Hurteau, and Oyler, which attempted to prove that an automobile described in the second count of the indictment was a stolen automobile which proof consisted of referring to tracer systems, manuals, and reports of insurance tracing records as to stolen automobiles on manuals and records in regard thereto. The court as this stage of the trial allowed this testimony over the objections of counsel for petitioner (R., pp. 41, 67, 73, 210).

At the commencement of his instructions to the jury, the court instructed the jury to disregard this line of testimony and not to consider the same in its deliberations (R., pp. 353, 355).

Other than the testimony and exhibits of Mrs. Winnegrad and the testimony ruled incompetent, there was no other competent testimony to identify the automobile as to which the petitioner was convicted, as a stolen automobile.

After initial instructions from the Trial Judge, the jury began deliberating at approximately 1:25 o'clock P. M. (R., p. 733) and deliberated until 11:25 o'clock P. M. at which time the jury was escorted to rooms at a motel

with instructions by the court to commence deliberating on the next morning at 8:30 o'clock A. M.

During the course of deliberation, during the first afternoon and evening, the jury indicated **ONE** time that it was unable to agree (R., p. 381).

During the morning after the jury recommenced deliberation, the court recalled the jury to the courtroom and gave suppplemental instructions to the jury. The jury had, shortly before, sent word that they were still unable to agree for the second time (R., p. 382). Counsel for petitioner objected to the supplemental instructions (R., pp. 388, 393, 394).

Approxmiately 12:05 o'clock P. M., the jury returned a verdict finding the petitioner guilty on the second count of the indictment and not guilty on the third count of the indictment (R., p. 395).

REASONS FOR GRANTING THE WRIT

In this case the United States Court of Appeals for the Fourth Circuit ruled against the position of the petitioner on appeal from the United States District Court for the District of South Carolina that his conviction should have been reversed as to the charge of unlawfully, willfully, and knowingly receiving a stolen motor vehicle which was moving in interstate commerce, in violation of Title 18, United States Code, Section 2312, which appeal challenged (1) the insufficiency or total lack of evidence as to one of the elements of the offense (2) violation of the petitioner's rights under the Sixth Amendment to the Constitution of the United States in that hearsay evidence was admitted and heard by the jury over the objection of petitioner's counsel; (3) supplemental "Allen" type charge to jury was coercive to jury and on further grounds that "Allen" type supplemental instructions should be abolished.

In so doing, the Court of Appeals and the District Court have decided legal issues and a substantial constitutional issue in a manner contrary to established principles of law and contrary to principle enunciated by this Court. Review of those decisions is necessary to correct the manifest miscarriage of justice which petitioner's conviction represents.

I

A Judgment of acquittal should have been ordered as to the second count of the indictment in that there was no competent evidence to identify the automobile described in said second count of said indictment and the Government thereby failed to prove an essential element of the charge against the Defendant, to wit: that the automobile was a stolen automobile.

Petitioner contends in his appeal from the conviction in the District Court that there was insufficient competent evidence to identify the automobile described in the indictment as the same automobile found in the possession of the defendant, petitioner herein.

The United States Court of Appeals for the Fourth Circuit in a *per curiam* opinion finds that the motor vehicle found in defendant's possession was sufficiently identified as a stolen motor vehicle and that the hearsay testimony concerning the identity of the vehicle was fully corroborated by admissible evidence.

The Court of Appeals in the instant case did not refer to any decisions upon which it based its findings.

In this case, the alleged owner gave a different serial number than the one alleged in the indictment. (R., pp. 13-15.) Also, the alleged owner testified as to a sales memorandum which did not give the complete serial number which numbers varied from the numbers given in her initial testimony and this number, being incomplete, only re-

flected the model and type but did not reflect any specific automobile. (R., pp. 58-61.) The alleged owner did not testify as to any unique marks or scratches but only testified as to make and color. The alleged owner did not have the original registration and this was not introduced in evidence.

The only other evidence of identification was the testimony of witness Oyler, Plowden, and Hurteau, which testimony attempted to identify through "tracer" reports and manuals which testimony was subsequently ruled incompetent by reason of being hearsay. (R., pp. 353-355.)

In this case the Government relied for identification, solely, upon the introduction of evidence as to serial numbers. No eyewitness identifications by the alleged owner was made even through photographs.

To convict in this instance, the Government must prove all of the elements of the offense which are: (1) that the vehicle involved was stolen (2) that it was transported across a State line (3) that it was willfully and knowingly received by the Defendant.

The Government proved by the witness, Pinckney, that the automobile was transported across a State line. However, the witness, Pinckney, did not testify that he had stolen the automobile, but, on the contrary, testified that possession had been delivered to him by one, Tatarka. Further, Pinckney testified that he had plead *nola contendere* to transporting automobiles, but no details were testified to as to which automobile he had transported. (R., pp. 122-176).

Eddie Tatarka was not presented by the Government and did not testify.

It is undisputed that a blue Chevrolet was delivered in Sumter, South Carolina to the Petitioner.

The owner of the automobile did not identify the automobile by sight or photograph which was allegedly found in the possession of the Petitioner and in fact testified that she had not seen the automobile since stolen and had not seen it before testifying. (R., pp. 12-17 and 58-62.)

The crux of the failure of the Government's case is that it did not prove that the automobile allegedly found in the possession of the Petitioner was a stolen automobile. The automobile was not in evidence. *Abraham v. United States,* 15F. (2d) 911.

Although the rulings of the District Court and the Court of Appeals do not cite any cases, it is apparent that both relied upon the line of cases cited by the Government in its brief which generally held that an insignificant difference between indentification numbers presented and the actual numbers simply raise a question of identity, not one of sufficiency. *Morandy v. United States,* 170 F. (2d) 5; *United States v. Wells,* 443 F. (2d) 910; *Johnson v. U. S.,* 195 F. (2d) 673.

At first consideration these cases seem to be in direct conflict withe *Cox v. United States,* 96 F. 241, which states, *inter alia,*

> "Proof that an automobile of a well known and widely distributed type and model is stolen in one state on Saturday and that a similar car is sold and delivered in an adjoining state on the following day is not sufficient evidence upon which to base a finding that the automobile stolen was the automobile sold, or a finding that the automobile sold was an automobile which had moved in interstate commerce. This is because the evidence, taking the view of it most favorable to the government, is not inconsistent with the hypothesis that the automobile sold was a different automobile than that which was stolen. Evidence which is consistent with two conflicting hypothesis tends to prove neither. (See cases cited); and proof of circumstances

which, while consistent with guilt, are not inconsistent with innocence, will not support a conviction. (See cases cited.)"

The *Cox* case, *supra* is further supported by the following cases: *Tyler v. United States,* 323 F. (2d) 711; *United States v. Casey,* 428 F. (2d) 229; *United States v. Delay,* 440 F. (2d) 566; *Watkins v. United States,* 409 F. (2d) 1382; *United States v. Shiver,* 414 F. (2d) 461. (See also, *C. J. S.,* Volume 61A, Section 706 (3) at page 609.)

Further, the rulings cited by the Government, and, apparently relied upon by the Court of Appeals are differentiated specifically in the case of *Thompson v. United States,* 334 F. (2d) 207.

In that case, the owner testified, as in the instant case, that the automobile was stolen from his residence. He testified as to serial numbers from document in his possession, as in the instant case. There was no evidence as to other distinquishing factors, as in the instant case.

There was a difference in the serial numbers as in the instant case.

In differentiating between the line of decisions cited by the Government in that case and in the instant case the Court of Appeals, in *Thompson v. United States, supra,* states:

"The *Cox* case has been cited with approval and followed in a number of cases including the recent one, *Tyler v. United States,* 10 Cir., 1963, 323 F. (2d) 711, which held that the evidence of identification was insufficient on facts as strong as those of this case.

"[1] This is not a case like *Johnson v. United States, supra,* where the automobile in the defendant's possession was satisfactorily identified as the stolen car alleged to have been transported in interstate commerce, even though there was a discrepancy between the allegations and the testimony as to the serial numbers. It is rather a case where the issue of identifi-

cation depended entirely upon identity of the serial numbers. There was no other evidence to connect the automobiles. They were of a standard make, model, body style and color. No evidence was offered to show any factor about either one of them other than its identifying numbers that would distinguish it from others of the same manufacture. Bohrer was the only witness who might possibly have given satisfactory testimony of identification, and he never saw his car after it was stolen. The evidence was therefore insufficient to support a conviction under either count."

For the foregoing reasons, the Courts below erred in overruling a motion for judgment of acquittal on the grounds of lack of evidence in that the Government never proved the automobile was stolen, a vital and material element of proof to support a conviction.

II

Appellant was denied the protection of the Sixth Amendment to the Constitution of the United States in that the jury was allowed by the Trial Judge to hear damaging hearsay testimony concerning the identity of the automobile set forth in Count No. 2 of the indictment, which error was not cured by subsequent instructions by the Trial Judge that said testimony be disregarded.

During the trial before the District Court, two witnesses were permitted to testify, contrary to objection, from the records received by telegram from the National Auto Theft Bureau, and from a similar agency known as N.C.I.C. By their testimony, it was attempted to show that the automobile in the possession of Petitioner described in the Second Count of the indictment was the automobile previously stolen from Mrs. Lillian Winnegrad of New York. After admitting this testimony, the District Court

ruled the testimony to be hearsay and instructed the jury to disregard it, as follows:

"The COURT: That concludes all of the testimony in the case. Now there's one matter that I want to call your attention from the standpoint there are two witnesses that have testified, one was Mr. Plowden from the National Auto Theft Bureau, I believe that was his capacity, who testified yesterday, and of course Mr. Oyler, who is the F.B.I. agent who has done most of the testifying from the standpoint of the investigation. You will recall that both of them in effect, and I'm not trying to quote exactly what they say, but I'll make it definite to where you'll understand what I'm talking about, that they in reference to the Chevrolet in the second count of the indictment, which allegedly was the property of Lillian Winnegrad, of New York, that's the lady and her husband that were here from New York, both of them testified as you will recall. This is as to the black Chevrolet, as it has been referred to, which is the charge in the second count of the indictment. Both of those government witnesses, the F.B.I. agent and Mr. Plowden in effect testified that during their investigation as to this particular Chevrolet that they by wire took up with the National Auto Theft Bureau, which is an agency or clearing house so to speak of reported stolen automobiles, and perhaps with another agency N.C.I.C., which is another similar type agency, and that they obtained information from the reports as a result of their inquiry as to this specific black Chevrolet Impala, which is in count two, that that Chevrolet belonged to Lillian Winnegrad, who was the lady who testified here in the case. There was a motion made at the time, and due to the fact that the court was not in a position to know whether it could be connected up, it hadn't been specifically ruled on by the court. I'm ruling on it now. The information that they got from those agencies to the effect that this specific Chevrolet was the property of the lady, Lillian Winnegrad, you will disregard, because it is hearsay. It was not connected up from

the standpoint of tracing it evidentiarily speaking. That is a conclusion that they have testified to, which is based on hearsay information that they obtained from these two agencies. Disregard that as evidence. I'm washing it out, you are not to consider it as evidence as to that effect.

"The other parts of their evidence as to the numbers, their identification, and the expertice as to what those numbers mean, of course, you have the right to consider. The only part I'm striking out of their testimony is the conclusion that they base on the hearsay report back to them, that it was the property of Lillian Winnegrad. I think that's all now, and we're ready for arguments."

This ultimate ruling of the District Court was correct. *United States v. Shiver,* 414 F. (2d) 461.

In the *Shiver* case, *supra,* evidence was admitted at trial of a police report as to the theft, the insurer's records identified by an insurance adjuster, and a certified copy of certificate of title. The Court ruled that this evidence was inadmissible as hearsay, and against the Government's contention that the same was admissible under 28 U. S. C., Section 1732, The Federal Business Records Act, and reversed the conviction of Defendant and ordered a new trial.

But the hearsay evidence also violated Petitioner's right to be confronted with witnesses against him, guaranteed by the Sixth Amendment to the Constitution of the United States. *Painter v. Texas,* 380 U. S. 400, 13 L. Ed. (2d) 923, 85 S. Ct. 1065; *Douglas v. Alabama,* 380 U. S. 1074, 13 L. Ed. (2d) 934, 85 S. Ct. 1074.

And the ruling out of this testimony came too late and petitioner submits could not expunge and eradicate the prejudice in the jurors' minds. *Bruton v. United States,* 391 U. S. 123, 20 L. Ed. (2d) 476, 88 S. Ct. 1620.

III

The supplemental "Allen Type" instructions were prejudicial to the Petitioner in that (1) specifically, the instructions given in this case contained irrelevant and immaterial matter which coerced the jury; (2) such type of instructions are completely unnecessary and serve no useful purpose, and should be abolished by this Court.

The charge given as supplemental instructions by the District Court in this case had previously been approved by the United States Court of Appeals, Fourth Circuit. *United States v. Sawyer,* 423 F. (2d) 1335.

The long dissertation on this point in the *Sawyer* case, *supra,* is a slight indication of the variances and nuances of opinions which plague the Courts in considering the effects of the so-called "Allen" charge.

The supplemental instructions have been severely criticized in numerous jurisdictions. See *United States v. Fioravanti,* 412 F. (2d) 407, and cited cases.

Almost every decision considering the "Allen" charge shows concern and a desire that some definite or definitive decision be made. See, *Basker v. Crouse,* 426 F. (2d) 531. *United States v. Martinez,* 446 F. (2d) 118.

Also, a divergence of opinion has appeared in numerous cases among judges. *United States v. Washington,* 447 F. (2d) 308.

It has been held numerous times that extensions of the charge should be discouraged. *United States v. Smith,* 303 F. (2d) 341; *United States v. Thomas,* 449 F. (2d) 1177.

The *Thomas* case, *supra,* is somewhat exhaustive in its discussion and points out further the elements of doubt involved.

Petitioner specifically urges that the supplemental instructions in the instant case go beyond the bounds of the original charge as approved by this Court in that the ele-

ment of **expense** of trial to the Government and to the Defendant are inserted in the record by this charge. (R., p. 382.) It is submitted that justice should not be given a price tag and jurors should not be made to feel that they are squandering tax money or the Defendant's money, should they not agree, and that such a charge is coercive.

It is more broadly urged that the Court should consider the question of the "Allen" charge in this case to (1) abolish its use, or (2) limit its application and use, at least, to the recommendations of the American Bar Association Standards.

CONCLUSION

Wherefore, Petitioner prays that the Petition for a Writ of *Certiorari* be granted.

Respectfully submitted,

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APPENDIX

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 72-2110

UNITED STATES OF AMERICA, APPELLEE,

versus

FRANK EDWARD WILLIAMS, SR., APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, AT COLUMBIA
J. ROBERT MARTIN, JR., CHIEF JUDGE

Argued February 8, 1973 Decided May 7, 1973

BEFORE WINTER AND RUSSELL, CIRCUIT JUDGES, AND MURRAY, DISTRICT JUDGE.

MORRIS D. MAZURSKY,
MATTHEW J. PERRY,
Attorneys for Appellant.
RYAN C. SHEALY,
Asst. United States Attorney,
JOHN K. GRISSO,
United States Attorney,
(on brief),
Attorneys for Appellee.

PER CURIAM:

In this appeal, we see no error: The motor vehicle found in defendant's possession was sufficiently identified as a stolen motor vehicle. The hearsay testimony concerning the identity of the vehicle was fully corroborated by admissible evidence and the jury was unequivocally charged to disregard the hearsay. The hearsay was not so prejudicial as to render its admission into evidence incurable error. The charge given when the jury reported tentative disagreement was approved by us in *United States v. Sawyers*, 423 F. (2d) 1335 (4 Cir. 1970).

AFFIRMED.

APPENDIX

OCTOBER TERM, 1972

No. A-1214

FRANK EDWARD WILLIAMS, PETITIONER,

versus

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of *certiorari* in the above-entitled cause be, and the same is hereby, extended to and including June 21, 1973.

/s/ WARREN E. BURGER,
Chief Justice of the United States.

Dated this 6th
day of June, 1973.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1728

FRANK EDWARD WILLIAMS, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (1) that there was no competent evidence that the car he was convicted of receiving had been stolen, (2) that the admission of certain hearsay testimony was prejudicial error, and (3) that the court erred in delivering a supplemental "*Allen*"-type charge.

Following a jury trial in the United States District Court for the District of South Carolina, petitioner was convicted of receiving a stolen vehicle, in violation of 18 U.S.C. 2312. He was sentenced to two years' imprisonment. The court ordered that the sentence be suspended after six months had been served and that petitioner then serve three years on probation. The court of appeals affirmed (Pet. App.).

1. Petitioner's contention that his conviction was not based on competent evidence that he had received stolen property is without merit.

The government's principal witness, Robert Pinckney, testified that he had delivered three cars he had obtained in New Jersey, including a blue 1970 Chevrolet Impala, to petitioner in South Carolina (Tr. 145-146). Pinckney informed petitioner that the cars, which were registered in New York, were "hot" (Tr. 131, 149). Petitioner paid Pinckney about $1,400 for the Impala (Tr. 146), and Pinckney furnished petitioner with a New York registration card for the car and a bill of sale showing a different price from that actually paid by petitioner (Tr. 148). Pinckney identified a photograph of the car seized from petitioner as similar to the one he had brought him (Gov. Ex. 6-13, Tr. 151) and stated that the car had broken locks when he sold it to petitioner and that petitioner had commented about them (Tr. 151). Mrs. Lillian Winnegrad testified that a blue 1970 Chevrolet Impala she owned, having a serial number 164370T disappeared from her home in New York on January 24, 1970 (Tr. 13). After the judge had noted that there was a discrepancy between the fifth digit in this number and that in the one set forth in the indictment, Mrs. Winnegrad was recalled to the stand and testified from her purchase order for the car (Gov. Ex. 3) that the correct registration number was 164390T (Tr. 60), which conformed to the indictment.

An official of the South Carolina Highway Department testified that the government's exhibit 4 was a copy of a vehicle registration card issued to petitioner's funeral home on February 4, 1970, for a 1970 Chevrolet with the same registration number Mrs. Winnegrad had stated to be that of her missing car (Tr. 68).

The card indicated that the car had been purchased by petitioner's funeral home from petitioner. What purported to be a New York registration, supplied to the South Carolina Highway Department by petitioner (Gov. Ex. 5), indicated that a registration had been issued to petitioner for the car by the State of New York and listed his address as 126 E. 124th Street, New York City (Tr. 69-70). A photograph of the car, taken after the vehicle was seized from petitioner, showed that it had the same registration numbers as described by Mrs. Winnegrad (Gov. Ex. 6-4, Tr. 74).

No objection was made during this testimony to its competency or sufficiency. It was only at the end of the trial that petitioner moved for acquittal because the government had failed to prove the car was stolen Since it is clear that there was sufficient evidence to establish that the car received by petitioner had in fact been stolen, including the testimony of the seller, Pinckney, that he informed petitioner that the car was "hot" and the testimony of Mrs. Winnegrad that her car had disappeared, the judge correctly overruled petitioner's motion.

2. Petitioner also contends that he was prejudiced by the admission of certain hearsay testimony. A special agent for the National Automobile Theft Bureau and an F.B.I. agent testified that through their conversations with the National Automobile Theft Bureau and the National Crime Information Center, a similar agency, they had learned the registration number of the vehicle stolen from Mrs. Winnegrad, and they repeated the number in court. The judge ruled that this testimony was inadmissible hearsay and instructed the jury to disregard it completely (Tr. 353-355). There is no reason to believe that the jurors were incapable of following this instruc-

tion, and in any event, since there was substantial evidence that the car received by petitioner had been stolen, he hardly could have been prejudiced.

3. Finally, petitioner contends that the court erred in employing an "*Allen*"-type charge. The jury retired to deliberate at 1:25 p.m. (Tr. 377). At 4:07 p.m., the jury requested an explanation of the term "beyond a reasonable doubt" (Tr. 378). The court instructed it on the meaning of the term, and it again retired at 4:15 p.m. (Tr. 379-380). Later in the evening the jury returned without having reached a verdict (Tr. 380-381). Following a recess, they deliberated from 8:45 until 11:30 that evening (Tr. 382). Deliberations began again at about 8:30 the next morning (Tr. 381). At 10:40, the jury indicated to the court that it still could not agree (Tr. 382). The jurors were then called back into court, and the court delivered a supplemental "*Allen*"-type charge (Tr. 382-388), which petitioner agrees conforms to the charge approved for use by the Fourth Circuit. *United States* v. *Sawyers*, 423 F. 2d 1335.[1]

Deliberations resumed at 10:55 a.m., and at 11:40 a.m. the jurors indicated to the court that they were confused as to which cars were involved in Counts II and III of the indictment, respectively (Tr. 388-389). At 11:45 a.m., the jurors were called into court and the judge repeated the description of the cars whose thefts were charged in the indictment (Tr. 391-392).

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[1] While the charge did note the expense of a retrial to "both sides," it specifically urged the jurors to endeavor to reach a unanimous verdict "without violence to your own individual judgment and conscience." The district court also emphasized "that the court does not wish any juror to surrender his or her convictions" (Tr. 383).

After the judge had finished, one juror explained that the jury had thought that Count II involved the brown car described in Count III instead of the blue Chevrolet Impala and that had been where they were making their mistake (Tr. 392-393). The jury retired at 11:55 a.m. and returned ten minutes later with a verdict of guilty as to Count II and not guilty as to Count III (Tr. 393-396). A poll of the jurors indicated each agreed with the verdict (Tr. 396).

Although three courts of appeals, in exercise of their supervisory powers, have recently determined that the "*Allen*" instruction should be abandoned in favor of modified forms of the charge,[2] no court of appeals has held that the traditional "*Allen*" instruction or the mitigated form utilized in this case is *per se* so coercive that a conviction following it must be reversed. Indeed, after the recent *en banc* consideration of this issue in the Fifth Circuit, that court refused to exercise its supervisory power to supplant use of the "*Allen*"

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[2] *United States* v. *Fioravanti*, 412 F. 2d 407 (C.A. 3), certiorari denied *sub nom. Panaccione* v. *United States*, 396 U.S. 837; *United States* v. *Brown*, 422 F. 2d 930 (C.A. 7), certiorari denied, 396 U.S. 1017; *United States* v. *Thomas*, 449 F. 2d 1177 (C.A.D.C.). See also *United States* v. *Silvern*, No. 72-1133, decided August 7, 1973, in which the Seventh Circuit affirmed a conviction involving use of a traditional *Allen* charge but admonished that any future supplemental charges deviating from the form of Instruction 8.11 of *Jury Instructions and Forms for Federal Criminal Cases*, 27 F.R.D. 39, 97-98, would be reversed. To our knowledge, only five states—Arizona, Pennsylvania, Alaska, Illinois and Montana—have disapproved instructions patterned substantially after the *Allen* charge. See *Instructing Deadlocked Juries: The Present Status of the Allen Charge*, 3 Tex. Tech. L. Rev. 313, 317-319 and n. 17, 327-331 (1972); *The Allen Charge Dilemma*, 10 Amer. Crim. L. Rev. 637, n. 108, 664 (1972). "*Allen*"-type instructions have been approved in at least 29 states.

charge in favor of any alternative instruction. *United States* v. *Bailey*, No. 72-1799, decided June 13, 1973. The development and use of the "*Allen*"-type instruction is being continually reexamined by the various circuits, and there is no necessity for this Court to reconsider *Allen* at this juncture before the courts of appeals have had an opportunity to see how their proposed changes work in actual practice.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.